No. 90-570

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

KENNETH L. McGINNIS,

Petitioner,

v.

JAMES ROSE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN
NATHAN P. MADDOX*
Assistant Attorneys General
500 South Second Street
Springfield, IL 62706
(217) 782-9054

Attorneys for Petitioner

*Counsel of Record

DOUGLAS K. SMITH
Assistant Attorney General
Of Counsel.

QUESTIONS PRESENTED FOR REVIEW

I. Whether an Illinois Pattern Instruction on Voluntary Manslaughter and Murder, later disapproved by the Illinois Supreme Court on the ground that it misassigned the burden of proof of an affirmative defense, violates the Constitution of the United States so as to provide a ground for habeas corpus.

II. Whether a federal court on collateral review of a state conviction may disregard a state procedural default, undisputed in state court, when the State Appellate Court has discussed whether an exception to the state procedural rule applied and concluded that it did not.

PARTIES TO THE ACTION

James Rose was the petitioner for relief under 28 U.S.C. § 2254 in District Court, and the appellant in the Court of Appeals for the Seventh Circuit.

Kenneth L. McGinnis is the Director of the Illinois Department of Corrections, successor to Michael Lane, the respondent-appellee below.

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No. _____

In The

Supreme Court of the United States

October Term, 1989

KENNETH L. McGINNIS,

Petitioner,

v.

JAMES ROSE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPINIONS IN THE CASE

Rose v. Lane, No. 87-2494 (7th Circuit, August 6, 1990) (Appendix A);

Rose v. Lane, No. 86-3088 (S.D.Ill., August 18, 1987) (Appendix B);

People v. Rose, No. 5-84-0078 (Ill.App. 5th Dist., July 11, 1985) (Appendix C).

JURISDICTIONAL GROUNDS

The appellate court's opinion sought to be reviewed is dated August 6, 1990. No motions for rehearing or extensions have been filed. This Court has jurisdiction to

review the judgment of the appellate court conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of The United States, Amendment XIV

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Mr. Rose was convicted of murder after a jury trial in the Circuit Court of St. Clair County, Illinois. The court instructed the jury on murder and voluntary manslaughter according to the Illinois pattern instructions then applicable. Voluntary manslaughter was at that time defined as all the elements of murder plus either a) a sudden and intense passion resulting from provocation, or b) an honest but unreasonable belief in the need for self-defense. Ill. Rev. Stat., ch. 38, par. 9-2 (1983). The instructions stated that the jury could not convict Rose of voluntary manslaughter unless the State proved that Rose had an unreasonable belief in self-defense. The murder instruction did not require the State to disprove beyond a reasonable doubt that Rose unreasonably believed he was acting in self-defense. *People v. Rose*, No. 5-84-0078 (Ill.App. 7/12/85), Slip op. at 2, 9. These instructions were later held erroneous in *People v. Reddick*, 123 Ill.2d 184, 526 N.E.2d 141 (1988). *Reddick* held that, in order to prove murder, the State must prove the absence of a

manslaughter mitigating factor if the defendant has presented some evidence of its existence. *Id.* 197, 526 N.E.2d at 146.

Mr. Rose appealed his conviction to the appellate court, raising inter alia the following issue:

> Whether, where the Court instructed the jury as to murder, voluntary manslaughter, and self-defense, and where the murder issues instructions included no reference to the State's burden of disproving the elements of voluntary manslaughter, the jury was improperly instructed since they were unable to distinguish the difference between murder and voluntary manslaughter and since the defense was effectively forced to prove the elements of voluntary manslaughter.

People v. Rose, No. 5-84-0078 (Ill.App. 7/12/85), Slip op. at 2.

Mr. Rose conceded that the issue was waived for failure to offer an alternative instruction, but urged the court to apply the Illinois "plain error" exception. The appellate court rejected this contention on the basis of prior appellate cases "which held that where the jury rejected a voluntary manslaughter charge, an omission in the murder instruction did not give rise to plain error." *Id.*, at 10.

Rose then petitioned the Illinois Supreme Court for leave to appeal, stating as his point relied on for reversal:

> The Court committed plain error and denied the defendant his constitutional right to due process because the jury, in considering the charged offense of murder and the instructed upon offense of voluntary manslaughter, was not

> instructed that the State bears the burden of negating the proffered elements of voluntary manslaughter.

Petition for Leave to Appeal. *People v. Rose*, Appendix D.

The Illinois Supreme Court denied leave to appeal. 111 Ill.2d 560 (1985).

Mr. Rose next filed a petition for habeas corpus relief in the United States District Court for the Southern District of Illinois, raising the issues raised on direct appeal. Appointed counsel for Rose submitted a memorandum in support of the petition in which he cited this Court's opinions of *Mullaney v. Wilbur*, 421 U.S. 684 (1974) and *Patterson v. New York*, 432 U.S. 197 (1972). He also urged the District Court to understand "that the elements of voluntary manslaughter effectively constitutes [sic] an affirmative defense to murder and it is not merely a lesser included offense in murder." Memorandum in support of habeas petition 12/18/86 *Rose v. Lane*, No. 86-3088, p. 11. (Appendix 3).

The District Court denied the writ, rejecting the instructions claim on the ground of State procedural default. *Rose v. Lane*, No. 86-3088 (S.D.Ill. Aug. 18, 1987), Slip op. at 5-6.

Rose appealed the denial to the Seventh Circuit Court of Appeals. More than a year after the briefs were filed, the circuit court issued an order on its own motion discharging Rose's counsel, appointing new appellate counsel, and ordering the parties to submit briefs on whether *People v. Reddick* applied to Rose's case and created a constitutional violation. *Rose v. Lane*, No. 87-2494,

Order Nov. 27, 1989 (Appendix F). *Reddick* had been decided after the parties completed their initial briefs.

The parties filed their briefs on the subject of *Reddick* error and the court issued its opinion on August 6, 1990. *Rose v. Lane,* No. 87-12494 (7th Cir.). The court did not address the arguments of the parties, but instead relied on its June 29, 1990 opinion in *Falconer v. Lane,* 905 F.2d 1129 (7th Cir. 1990). The court only stated in a footnote that *Reddick* created a federal claim through *In Re Winship,* 397 U.S. 358 (1970). *Rose v. Lane,* No. 87-2494, Slip op. at 3, n. 1. The appellate court rejected the District Court's procedural default holding, deciding instead that the State court had discussed the merits by considering whether the plain error exception to waiver applied. *Id.,* at 4-5. The court granted the writ conditioned on retrial within 120 days. *Id.,* at 7.

ARGUMENT

I.

THE APPELLATE COURT'S HOLDING, THAT AN INSTRUCTION WHICH MISASSIGNS THE BURDEN OF PROOF OF AN AFFIRMATIVE DEFENSE UNDER STATE LAW ALSO DENIES DUE PROCESS UNDER *IN RE WINSHIP,* 397 U.S. 358 (1970), IS CONTRARY TO THIS COURT'S HOLDING IN *ENGLE v. ISAAC,* 465 U.S. 107 (1982).

In *People v. Reddick,* 123 Ill.2d 184, 526 N.E.2d 141 (1988), the Illinois Supreme Court found two faults with the standard jury instructions on Murder and Voluntary Manslaughter given up through 1987. (The Legislature amended the voluntary murder statute effective July 1,

1987, renaming it second degree murder and clarifying the burdens of proof of the elements and defenses. *Reddick* at 197, 526 N.E.2d at 146). First, the instructions wrongly required the State to prove the existence of one of the mitigating circumstances that would reduce murder to manslaughter. *Id.* at 94-95, 526 N.E.2d at 145. Second, the instructions wrongly omitted the State's burden to disprove the existence of these mitigating circumstances to sustain a murder conviction when the defendant had presented some evidence of their existence. *Id.*, at 197, 526 N.E.2d at 146. The *Reddick* court reasoned that the circumstances which would reduce murder to voluntary manslaughter (unreasonable belief in self-defense or sudden provoked passion), while they appear to be elements of manslaughter, actually operate as affirmative defenses to murder, albeit not total defenses. Under State law, the burden of proof to negate an affirmative defense (other than insanity) is on the State once the issue is raised. Ill. Rev. Stat., ch. 38, par. 3-2. The court concluded that the instructions violated State law by omitting this burden on the State in cases in which voluntary manslaughter was at issue. *Reddick* at 197, 526 N.E.2d at 146.

This Court held in *Engle v. Isaac*, 456 U.S. 107 (1982) that jury instructions which misstate, as a matter of State law, the burden of proof regarding an affirmative defense do not violate due process. *Id.*, at 120-122. Thus, the Seventh Circuit's statement that "*Reddick* creates a federal claim through *In Re Winship*, 397 U.S. 358 (1970)" (*Rose v. Lane*, No. 87-2494, Slip op. at 3, n. 1) is incorrect. (The Court's observation in the same footnote that "Rose's claim to the State [and district] courts was that the

instructions denied him a lesser included offense" is factually mistaken. Appendix C, D, E).

Notwithstanding the citation to *Winship*, the Seventh Circuit stated that its decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990) was dispositive. *Rose v. Lane*, No. 87-2494, Slip op. at 3-4. In *Falconer*, the court expressly declined to apply analysis of burden of proof and presumption questions. *Id.*, at 1136 (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); and *Martin v. Ohio*, 480 U.S. 228 (1987)). The *Falconer* court instead found error in the fact that all the elements of murder are also elements of voluntary manslaughter, and the jury is not expressly told that if it finds all the elements of manslaughter it must enter a guilty verdict on that count only. *Falconer* at 1136. Apart from a citation to *United States ex rel. Reed v. Lane*, 759 F.2d 618 (7th Cir. 1985), the *Falconer* court did not explain why this "error", which was not found by the *Reddick* court, violates due process. Respondent in this case argued that *Reed* was inapplicable for the same reasons discussed in *Fleming v. Gramley*, 735 F.Supp. 302 (C.D.Ill. 1990).

Further, by noting that the mitigating circumstances of manslaughter do not negate an element of murder, the Seventh Circuit conceded that the *Reddick* instructions are of the same type as those discussed by this Court in *Patterson v. New York*, 432 U.S. 197, 207-208 (1977), thus further removing the case from *In Re Winship*.

If this Court does not grant certiorari, the decision of the Seventh Circuit Court of Appeals will have released a convicted murderer from State prison on grounds of an error of State law, and on a theory never discussed by the

State Supreme Court. Further, the holding would allow the release of every murderer in Illinois convicted between 1961 and 1987 who had a voluntary manslaughter instruction given at his or her trial.

II.

THE COURT OF APPEALS HAS MISAPPLIED THIS COURT'S DECISION IN *HARRIS v. REED* TO ALLOW A FEDERAL COURT TO REVIEW THE MERITS OF AN ISSUE WHERE A STATE COURT HAS DENIED RELIEF SOLELY ON PROCEDURAL GROUNDS.

In *Harris v. Reed,* 109 S.Ct. 1038 (1989) this Court reaffirmed that the procedural default rules in habeas corpus of *Wainwright v. Sykes,* 433 U.S. 72 (1977) has its basis in the "adequate and independent state ground" doctrine. *Harris v. Reed,* at 1042. This Court applied the "plain statement" rule to habeas cases, that is "if 'it fairly appears that the state court rested its decision primarily on federal law', this Court may reach the federal question on review unless the State court's opinion contains a 'plain statement' that its decision rests on adequate and independent state grounds." *Id.* To prevent the federal court from reaching a defaulted claim, the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. "Ambiguity in that regard must be resolved by application of the [*Michigan v.*] *Long* standard." *Id.*

This Court noted specifically in *Harris* that the State court went on to reject the federal claim on the merits, making the reference to State law in the State court's opinion insufficient to demonstrate whether the court intended to invoke waiver as an alternative ground. *Id.* at

1045, n. 13. The Seventh Circuit has applied the plain statement rule to any case in which the State court has discussed whether an exception to the procedural bar applies. The court stated that when a State court entertains the question of whether the "plain error" exception to a procedural bar applies, it must clearly state that this is an "alternative ground" to the waiver. *Rose v. Lane*, No. 87-2494, Slip op. at 4-5.

— In the instant case, the defendant conceded on direct appeal that his claim was barred, but urged the court to apply the "plain error exception." The State court considered only whether the plain error exception applied, and concluded that it did not based on previous decisions which had declined to apply the exception. *People v. Rose*, No. 5-84-0078, Slip op. at 9-10. The Seventh Circuit characterized this as a discussion of the merits. *Rose v. Lane*, No. 87-2494, Slip op. at 5. It was noted that the State court relied on *People v. McGee*, 40 Ill.App.3d 766, 443 N.E.2d 1057 (1982) in denying Rose's claim. *McGee* was another case in which waiver was conceded and the plain error exception was urged. *Id.* at 775, 443 N.E.2d at 1063. In declining to apply the exception, McGee cited a case which had denied the claim on the merits. *Id.* It cannot be said that by citing to a case which cited to a case which reached the merits, the State court was ambiguous about whether it relied on a procedural bar.

If certiorari is not granted, the Seventh Circuit's holding will allow federal courts to disregard procedural bars in State courts, even where the procedural bar was the only ground for denying relief. No State court is considering whether to apply an exception to a procedural rule, would make a "plain statement" that the

absence of an exception is an alternative ground to the rule.

> [A] holding that error is not plain error is a holding that the State court is relying on the defendant's procedural default to decide a case – not a holding on the merits . . . The fact that a State court has discretion to disregard procedural defaults where plain error exists does not mean the state loses its right to stand on its procedural rules on collateral attack when the State court decides that no plain error allowed federal courts to review the merits of issues that would otherwise be barred, states might become reluctant to exercise their discretion to correct plain errors. This is a result we ought not to encourage.

Rogers-Bey v. Lane, 896 F.2d 279, 284 (7th Cir. 1990) (Manion, J. concurring).

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner respectfully requests this Court to grant certiorari to review the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN
NATHAN P. MADDOX*
Assistant Attorneys General
500 South Second Street
Springfield, IL 62706
(217) 782-9054

Attorneys for Petitioner

*Counsel of Record

DOUGLAS K. SMITH
Assistant Attorney General
Of Counsel.

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 87-2494

JAMES ROSE,

Petitioner-Appellant,

v.

MICHAEL P. LANE, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois
No. 86 3088 – **Gerald B. Cohn, *Magistrate.***

ARGUED JUNE 11, 1990 – DECIDED AUGUST 6, 1990

Before CUDAHY, FLAUM, and RIPPLE, *Circuit Judges.*

FLAUM, *Circuit Judge.* James Rose appeals the district court's denial of his petition for habeas corpus. He claims that he was denied due process of law when the trial court gave a jury instruction on the burden of proof that was in violation of state law. For the reasons stated below, we reverse the district court and grant the writ of habeas corpus.

I.

The facts in this case are undisputed. On March 16, 1983, Rose shot and killed Tommy Mays. That morning

Rose and Mays argued for some time and Mays made threatening statements to Rose. Their paths crossed that afternoon when Rose pulled his car next to Mays, who was walking along the side of the road. The two began to argue and as tempers flared, Rose shot Mays twice, killing him.

In October 1983, a Circuit Court of St. Clair County, Illinois convicted Rose in a jury trial of murder and armed violence and acquitted him of voluntary manslaughter. Rose attempted to prove at trial that he believed the shooting was justified because he feared for his life. The court instructed the jury on murder and voluntary manslaughter according to the Illinois pattern jury instructions then applicable. These included an instruction stating that the jury could not convict Rose of voluntary manslaughter unless the State proved that Rose held an unreasonable belief at the time of the shooting that his actions were justified. The court did not instruct the jury that to convict Rose for murder, the State was required to prove beyond a reasonable doubt that Rose lacked a belief that circumstances justified or exonerated the killing.

Rose objected to the murder instruction on grounds not relevant to this appeal and did not object to the voluntary manslaughter instruction or the burden of proof for voluntary manslaughter. On appeal, Rose argued that the jury instructions violated state law and the due process clause. The Illinois Appellate Court noted that Rose had waived his arguments because he had not objected to the instructions at trial. The court went on, however, to address the merits, holding that under *People v. McGee*, 110 Ill. App. 3d 766, 443 N.E.2d 1057 (1982), the

trial court is not required to instruct the jury that the State must negate the elements of voluntary manslaughter beyond a reasonable doubt. The Illinois Supreme Court denied review.

Rose then filed a petition for a writ of habeas corpus in federal district court, realleging that the jury instructions violated the due process clause. The district court held that Rose had procedurally defaulted by not objecting to the instruction at trial. Rose appeals the denial of the writ.

After the district court's decision in this case, the Illinois Supreme Court decided *People v. Reddick*, 123 Ill. 3d 184, 526 N.E.2d 141 (1988). In *Reddick*, a consolidated appeal, the State charged both defendants with murder, and both defendants asserted that circumstances existed that would lower the offense to voluntary manslaughter. The trial courts instructed the juries with the Illinois Pattern Jury instructions for murder and manslaughter, the same instructions under which Rose was convicted.

The Illinois Supreme Court invalidated the instructions and reversed the appellants' convictions, holding that the instructions improperly allocated the burden of proof because they did not require the State to prove the nonexistence of circumstances that would reduce the crime to voluntary manslaughter. The court held that the Illinois Criminal Code of 1961 required the State to prove beyond a reasonable doubt that the voluntary manslaughter defense has no merit.

Rose now claims that because his jury instructions violated *Reddick*, he was denied due process.[1] He also

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[1] There is a serious question concerning whether this issue is properly presented to this Court. The *Reddick* claim is not the

(Continued on following page)

argues that the jury instructions were fundamentally unfair because they precluded a finding of voluntary manslaughter. After argument, but before this decision, this Court decided *Falconer v. Lane*, No. 89-2895, slip op. (7th Cir. June 29, 1990). *Falconer* concerned the same Illinois Pattern Jury instructions for murder and manslaughter and their constitutional implications. We held, following *Reddick*, that the instructions were gravely erroneous and denied the defendant due process of law. *Falconer* is, therefore, dispositive of this matter, leaving us to address procedural default and whether the error was harmless when applied to this set of facts.

II

We turn first to procedural default. The district court held that federal review was foreclosed because Rose defaulted on his due process claim when he did not offer an alternative instruction. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). The district court relied on the state appellate court's finding that "the petitioner failed to request an instruction" concerning the State's burden of disproving the elements of voluntary manslaughter and had

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(Continued from previous page)

same as the due process claim he presented to the state courts. *Reddick* creates a federal claim through *In re Winship*, 397 U.S. 358 (1970), while Rose's claim to the state courts was that the instructions denied him a lesser included offense. The *Reddick* claim, therefore, was not presented to the state courts, so Rose may have waived the issue. The State, however, does not argue this position. Moreover, Rose's argument was not raised to the district court but, once again, the State has not argued that it was waived.

therefore waived this issue. The district court concluded that Rose had not preserved his claim.

The district court, however, decided this case before *Harris v. Reed*, 109 S. Ct. 1098 (1989). We believe that under *Harris*, Rose's claim is not procedurally barred. "The Supreme Court held in *Harris* that the 'plain statement' rule of *Michigan v. Long*, 463 U.S. 1032, 1042 and n.7, applies to federal habeas cases as well as to cases on direct review." *Rogers-Bey v. Lane*, 896 F.2d 279, 281 (7th Cir. 1990). The rule in *Harris* is that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case *clearly and expressly states* that its judgment rests on a state procedural bar." *Harris*, 109 S. Ct. at 1043 (citations omitted, emphasis added).

In *Rogers-Bey* we considered the situation where an Illinois appellate court finds an issue waived but goes on to consider the merits under a plain error analysis. We held that where the court reaches plain error, it must state clearly that it is reaching the plain error analysis only as an alternative to waiver.[2] "[T]he state court must not only rely on the procedural default, it must actually state that it is doing so and that other grounds are reached only in the alternative." *Rogers-Bey*, 896 F.2d at 282.

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[2] Under Illinois law, Illinois courts need not reach the merits of a claim under the plain error doctrine after finding procedural default. *Phillips v. Lane*, 787 F.2d 208, 211-15 (7th Cir. 1986). If an Illinois court wishes to rely on waiver, therefore, it can simply state that relief is denied for reasons of procedural default or reach plain error only as an alternative that is clearly independent.

We do not believe that in this case the Illinois court clearly and expressly stated that it relied on waiver to deny Rose's claim. While the court did state that Rose failed to offer alternative jury instructions and that this was grounds for waiver, the court reached the merits under a plain error analysis and relied on *People v. McGee*, 443 N.E.2d 1057 (1982) to deny Rose's claim. The court did not state that it was relying on waiver or that it reached the plain error analysis only as an alternative ground for dismissing Rose's claim.

Moreover, under Illinois law, Rose would not be barred from bringing a *Reddick* claim on appeal even though he did not object at trial. The Illinois Supreme Court in *Reddick* invoked an exception to the state contemporaneous objection rule under facts similar to this case. The *Reddick* defendants also failed to object to the manslaughter instructions at trial. After stating the Illinois waiver rule, the court held that:

> [I]f the interests of justice require, substantial defects in jury instructions in criminal cases may be considered, even though the defendant has failed to make timely objections. This exception will be invoked to correct grave errors or to correct errors in cases so closely balanced that fundamental fairness requires that the jury be properly instructed.
>
> The instant cases involve grave error.

Reddick, 526 N.E.2d at 147. The error here is the same as in *Reddick*. Thus, under Illinois law, Rose's claim is not barred. Absent a clear statement by the state court that the claim is barred and with strong indications that the

claim would not be barred under state law, we are compelled to conclude that Rose has not procedurally defaulted.

The second issue we must decide is whether the trial court's constitutional error was harmless. We conclude that it was not. There was evidence that Rose believed he was acting in self-defense. The evidence indicated that Mays had been threatening Rose and was drunk and belligerent. Following an altercation with Rose that morning, Mays fired two shotgun blanks, threatening that he could shoot drunk as well as sober. This evidence indicates that with proper instructions, the jury might not have convicted Rose of murder.

Moreover, the instructions confused the jury. After some deliberation, the jury contacted the bailiff and asked the following question in writing: "If a decision of Armed Violence is rendered and signed, does the charge of Murder also need to be signed? And must we find him not guilty of Voluntary Manslaughter?" The judge responded in writing that the jury had to sign three verdicts, one each for murder, armed violence, and voluntary manslaughter. While this question could have a variety of implications, it indicates possible jury confusion over the manslaughter instructions and therefore contributes to our finding that the instructions were not harmless.

Finally, *Falconer* found that the instructions were inherently prejudicial because they misdirected the jury, holding that "[e]xplicit misdirection on this scale violates the constitutional guarantee of due process and demands a new trial or resentencing." Slip op. at 14. The reasoning

of *Falconer* on the harmless error issue cannot be confined to the facts of that case. We conclude that the instructions in question here were not harmless.

III.

The denial of the writ of habeas corpus is REVERSED. The writ of habeas corpus is granted unless the State of Illinois retries him within 120 days herefrom.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JAMES ROSE, JR., Petitioner,	)	
vs.	)	CIVIL NO. 86-3088
MICHAEL P. LANE, Respondent.	)	

ORDER

(Filed Aug. 18, 1987)

Pursuant to 28 U.S.C. § 636(c), the parties have consented to final entry of judgment by a United States Magistrate. A Notice of Referral was entered by the Clerk of this Court on December 9, 1986, pursuant to an Order of Chief Judge James L. Foreman on March 14, 1986.

Petitioner, an inmate at Menard Correctional Center, filed a habeas corpus Petition pursuant to 28 U.S.C. § 2254 on March 4, 1986, on the following grounds which he has exhausted in State courts:

1. That it was not proved beyond a reasonable doubt that petitioner did not possess the belief, albeit unreasonable, that circumstances existed which justified the killing;

2. That comments made by the prosecutor during final argument were so prejudicial and inflammatory as to deny petitioner his right to a fair trial;

3. That the jury was improperly instructed by the State's failure to instruct the jury as to the State's burden of disproving elements of voluntary manslaughter;

4. That the Court erred in considering the fact that the petitioner's conduct had caused serious bodily harm resulting in death, since bodily harm is a factor inherent in all murder cases, it's use is therefore not proper in determining length or severity.

Petitioner does not dispute the facts in this case; therefore, we must presume that the state court's findings of fact are correct, 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539 (1981), and we may rely on the factual summaries contained in the Illinois Appellate Court opinion. *Green v. Greer*, 667 F.2d 585 (7th Cir. 1981). The appellate court's summary of the facts is contained in the appellate court order attached to respondent's motion to dismiss. *People v. Rose*, No. 5-84-0078 (5th Dist., Jul. 11, 1985).

The petitioner's first ground for habeas relief is that it was not proved beyond a reasonable doubt, that petitioner did not have an unreasonable belief about his victim's intentions. This Court's task concerning review of habeas claims – regarding the sufficiency of evidence – is to simply determine if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In making this determination, we must review the evidence in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A reasonable trier of fact could have found that the petitioner murdered Tommy Mays (Maze). The evidence presented to the jury reflected two incidents taking place on a single day. While the petitioner would prefer the events to be viewed as a long series of occurrances, the jury could also have, and did conclude that the shooting was a separate and unjustified happening. The jury

apparently believed, as it could have done from the evidence presented, that the petitioner intentionally drove up and fired two shots at the victim with a shotgun from close range. The jury also apparently chose to negate testimony that the deceased had fired shots at the petitioner earlier in the day. This weighing of the evidence is properly the duty of the trier of fact.

The petitioner's next ground concerns comments made by the prosecutor during closing argument. The petitioner would have this Court find that the closing argument was so prejudicial and inflammatory as to deny the petitioner a fair trial. The proper standard to be applied when determining whether a prosecutor's comments are so egregious as to require reversal is whether the " 'statements were so inflammatory and prejudicial to the defendant petitioner as to deprive him of a fair trial and thus deprive him of his liberty without due process of law as proscribed by the Fourteenth Amendment." *Jentges v. Milwaukee County Circuit Court*, 733 F.2d 1238, 1242 (7th Cir. 1984), *quoting United States v. Zylstra*, 713 F.2d 1332, 1339 (7th Cir. 1983). In making this determination, it is necessary to examine the allegedly prejudicial remarks in the context of the trial as a whole. *United States ex rel. Garcia v. Lane*, 698 F.2d 900, 902 (7th Cir. 1983).

This Court has reviewed the alleged prejudicial comments made during the closing argument in the context of the entire trial record and is of the opinion that the statements were not so prejudicial as to deprive the petitioner of his right to a fair trial. This Court agrees with the Appellate Court that the closing remarks were addressed to "the general reluctance of the witnesses to

cooperate with the police and the resultant difficulty of the police in getting information from them." *People v. Rose*, No. 5-84-0078 (5th Dist., Jul. 11, 1985). The appellate court also noted that the trial court had sustained an objection by the defense, when the argument went beyond those limits, to suggest that the defendant was capitalizing on people's fears of becoming involved. The trial court instructed the jury to disregard that part of the argument.

Review of a prosecutor's closing remarks on habeas review must determine whether the allegedly prejudicial remarks rendered the trial fundamentally unfair to the degree that the defendants due process rights have been violated. *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 (1974). Conduct of state prosecutors asserted in federal habeas corpus to be unfair and prejudicial has constantly been held to fall short of constituting a denial of due process. *Zemina v. Solem*, 438 F. Supp. 455, 465 (D. S.D. 1977). In this case, petitioner fails to demonstrate that the prosecutor's closing argument, in light of the entire trial, was so prejudicial and inflammatory as to render the trial fundamentally unfair.

The petitioner's next ground concerns the State's failure to instruct the jury as to the State's burden of disproving elements of voluntary manslaughter. Questions concerning jury instructions are normally matters of state law and are not cognizable in federal habeas corpus proceedings. *United States ex rel. Waters v. Bensinger*, 507 F.2d 103, 105 (7th Cir. 1974). *See also Fleener v. Duckworth*, 559 F. Supp. 1322, 1327 (N.D. Ind. 1983). A habeas corpus

claim generally lies only where the giving of an instruction is so prejudicial that it amounts to a denial of fundamental fairness. *United States ex rel. Smith v. Fogel*, 403 F. Supp. 104, 106 (N.D. Ill. 1975). In *Henderson v. Kibbe*, 431 U.S. 145 (1977), the Supreme Court stated:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates . . . " not merely whether "the instruction is undesirable, erroneous, or even universally condemned. . . . "

Id. at 154. The Court further stated that "[a]n omission, an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155.

In the present case, the petitioner contends that evidence was presented that could have enabled the jury to find him guilty of voluntary manslaughter instead of murder. The petitioner contends that the trial court should have instructed the jury that the state had the burden of disproving the elements of voluntary manslaughter where it was seeking a conviction for murder. The state appellate court, in their review of the petitioner's conviction, noted that the petitioner failed to request an instruction to that effect. The petitioner's failure to offer the instruction is a procedural default which precludes this Court from considering the question. Failure to comply with a state's procedural requirement will

preclude federal habeas corpus review unless the petitioner can show (1) cause for the non-compliance and (2) prejudice resulting therefrom. *Engle v. Issac*, 456 U.S. 107, 129 (1982); *United States v. Frady*, 456 U.S. 152, 167-68; *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). The petitioner cannot show prejudice in this case. The jury was presented with both a murder instruction and voluntary manslaughter instruction prior to their deliberations. The jury rejected the manslaughter instruction in finding the petitioner James Rose guilty of murder.

The final ground for relief alleged by the petitioner concerns the severity of the sentence. The severity of a sentence is not sufficient grounds for relief on federal habeas corpus. *Hutto v. Davis*, 454 U.S. 370 (1982).

While the petitioner claims that the trial court erred by considering bodily harm resulting in death as a factor in sentencing for a murder conviction, the record indicates the factors considered in sentencing. The trial court carefully considered the testimony and the petitioner's record of prior criminal ity before pronouncing sentence. The petitioner was found to have deliberately shot and killed Tommy Mays. The sentence imposed was within the statutory limits as set forth by the legislature of the State of Illinois. It is therefore apparent that the trial judge did not abuse his discretion in sentencing James Rose, Jr. by considering that the petitioner inflicted bodily harm, but based the sentence on the entire body of evidence and factors before him.

For the above reasons, petitioner has failed to state a claim upon which relief may be granted. Therefore, the petition for the writ if DENIED.

Dated this 18th day of August, 1987.

/s/ Gerald B. Cohn
GERALD B. COHN
UNITED STATES
MAGISTRATE

APPENDIX C

No. 5-84-0078

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES ROSE, JR., Defendant-Appellant.	)	Appeal from the circuit court of St. Clair County. Honorable Patrick J. Fleming, Judge Presiding.

JONES, P.J.

ORDER
(Filed July 11, 1985)

A jury found the defendant, James Rose, Jr., guilty of the offense of murder and armed violence and not guilty of the offense of voluntary manslaughter. He was sentenced to a forty-year term of imprisonment on the murder conviction and now appeals the murder conviction and sentence, presenting four issues for review:

> "I. Whether it was proved beyond a reasonable doubt that Mr. Rose did not possess the belief, albeit unreasonable, that circumstances existed which justified the killing, where during an earlier scuffle between the defendant and the deceased, the latter was intoxicated, hit and cursed at the defendant, and then fired two shots at the defendant, and where during their later meeting the victim was again intoxicated and made threatening gestures toward the defendant.

II. Whether the prosecutor's repeated references to the defendant's allegedly having threatened the witnesses against him with retaliation was both improper and prejudicial, since there was absolutely no evidence supporting the remarks, since the court had during trial foreclosed the prosecutor from pursuing this line of questioning, and since the defense had no opportunity to rebut these remarks with evidence or argument of its own.

III. Whether, where the Court instructed the jury as to murder, voluntary manslaughter, and self-defense, and where the murder issues instructions included no reference to the State's burden of disproving the elements of voluntary manslaughter, the jury was improperly instructed since they were unable to distinguish the difference between murder and voluntary manslaughter and since the defense was effectively forced to prove the elements of voluntary manslaughter.

IV. Whether consideration by the court, in sentencing the defendant to the maximum forty year term for murder, of the fact that the defendant's conduct had caused serious bodily injury resulting in death, was improper since that factor is inherent in all murder cases."

We affirm.

With respect to the first issue the defendant raises, we have read the entire record on appeal. From the evidence the jury could have concluded – and by its verdicts it plainly did so conclude – that the defendant did not possess the belief, however unreasonable, that circumstances existed to justify the killing, as he maintained, but instead lay in wait for the victim, Thomas Maze, as the latter walked unarmed from the Chic Chic

Lounge in Centreville on the afternoon of March 16, 1983. The Jury apparently believed, as it could have done from the evidence presented, that the defendant drove up to the victim with the barrel of a shotgun protruding several inches through the window on the driver's side of the defendant's station wagon and, from a distance of about three feet from the victim, intentionally fired two shots at him, the first striking the victim's left hand, in which he was carrying a bottle of beer, the second causing severe damage to the right side of the victim's oral cavity and neck, rupturing his right jugular vein and causing death. The credibility of the witnesses is a matter for the determination of the trier of fact, and in the instant case the jury did not find persuasive the defendant's account of the incident by which the defendant drove up to the victim in order to "reason" with him in an effort to change the victim's behavior toward the defendant, believed the victim was about to fire a pistol at him, picked up his 12-gauge "automatic" shotgun from the floor of his car, where it happened to be lying because he had forgotten to put it away earlier, fired at the victim's left hand in order "to shoot his gun out of his hand," and drove away, his shotgun accidentally discharging a second shot into the victim's face and neck as he did so. The testimony of the defendant differed on several material points from that of not only the State's four eyewitnesses to the incident but from that of the witnesses the defendant called in his own behalf concerning the victim's firing of two shots out of his trailer window earlier in the day. There were discrepancies as well between the testimony given by one of the witnesses the defendant called

concerning the incident earlier in the day and the testimony of the Centreville Chief of Police, called by the State, with regard to the statement the witness had given him in which the earlier episode had been entirely omitted. We need not set forth the details of all of these discrepancies. Such conflicts required the jury to make a determination about the credibility of the witnesses that we, as a court of review, are not at liberty to disturb.

With regard to the second issue the defendant raises, we set forth the remarks of the prosecutor complained of by the defendant, made as the prosecutor concluded his closing argument:

> "I wanted to talk about one other issue, there has been a lot brought out about in this case. The police. Talk about the police of Centreville. These police are the bad guys. They are the villains. The same old red herring. The old worn out saw. Put everybody on trial but the defendant.
>
> These miserable police out there. A guy gets shot down in broad daylight. The police go out there and begin questioning people, and you heard everybody that testified. Did any one of them say, yes, I told them what happened? You think about that, people. By everybody's testimony, this man was there and shot him, even by his own.
>
> Who? Name one. Give me one person that says anything to the police when they come out there. Everyone of them acknowledged that they didn't want to get involved. They did not say anything to the police. They did not tell the police one word about it. Not a word.
>
> Can you even imagine? Can you conceive this could happen? And why do you think that

could happen? How can it happen that a man, in broad daylight, in front of witnesses, can boldly drive up to a person, and swat him out like a fly?

I will tell you how it happened. It happens when you rule with fear. And these poor police officers beat their brains out trying to get this story. Yes, they had to work with the story. Sure they had to work to get to the bottom of this thing. And it has been a hard fight every step of the way.

Because shots ring out in Golden Gardens [apparently the name of a housing development in the area in which or near the place where the victim was killed]. You hear shots ringing out in Golden Gardens. It is not that uncommon an occurrence to hear shots ringing out in Golden Gardens.

MR. DURSO [counsel for defendant]: Objection, your Honor. There is no testimony to that effect. He is making it sound like a carnival out there.

THE COURT: Closing argument. Overruled.

BY MR. HANKS [Assistant State's Attorney]: And the people that live in Golden Gardens live in fear of things like that.

MR. DURSO: Your Honor, I will object to that.

MR. HANKS: I think I can go to reasonable inferences –

THE COURT: I will sustain that objection.

BY MR. HANKS: They don't tell the police. They didn't cooperate with the police. You put on a badge. You go to Golden Gardens. You see what cooperation you get.

And I will tell you though, when it happened, nevertheless, truth came up off that little street in Golden Gardens, and it followed him all the way to here today, all the way through this murky, muddy, nasty mess. The light of truth is awful and sometimes frightening, but it points the finger of guilt undeniably and inelectibly [sic] right at this man.

I will tell you, the police of Centreville did their duty. And I ask you again to consider every witness. They all said no, I didn't talk to the police. I put it off. I held them off. Over and over again. But the police stayed after it and they did their duty.

And some of the people of Golden Gardens finally got up the stuff to do their duty. And the State has done their duty. And I am going to ask you to do yours, because I am going to tell you, this man murdered Thomas Maze that day. He murdered him in cold blood. And he figured he could do it because the people were too afraid.

MR. DURSO: Objection, your Honor.

THE COURT: Sustained.

MR. DURSO: And I ask the jury be instructed to disregard that.

THE COURT: The jury will disregard that remark."

It is undisputed that all of the State's eyewitnesses were extremely reluctant to reveal to police any knowledge of the incident when police first interviewed them. This reluctance was brought out on cross-examination of some of these witnesses in an attempt by the defense to show, as defense counsel indicated in his closing argument, coercion of these witnesses by police in order to obtain statements from them. One of the eyewitnesses for

the State, Annie Crawford, testified on direct examination that on the day the incident occurred the police "asked me did anybody see anything and I lied. I said, 'No, I didn't see nothing.' You know when they comes [sic] and I didn't see nothing." Another of the State's eyewitnesses, Reginald Coleman, testified on redirect examination that he had refrained from responding to the questions of police at first because he "really didn't want to get involved." A defense objection to the question on redirect of whether the witness was "frightened to give a statement" was made and sustained after the witness had responded, "At first." Another of the State's eyewitnesses, Homer Darough, testified on direct examination that he had been reluctant to talk to the police about the incident initially. A defense objection to the question of whether the witness was "frightened" was sustained. The Centreville chief of police testified on cross-examination that Kenneth Rattler, another of the State's eyewitnesses, had met with him and another police officer at Holten State Park. On redirect the witness stated that the officers had met Rattler there "at his [Rattler's] request. He was scared. He was scared for retaliation. He didn't want nobody to see Lt. McWherter and I talking to him at the police station or anywhere near the City Hall." One of the defendant's witnesses, L.G. Calamese, testified that he had heard the sound of "shots" a number of times in the area known as Golden Gardens. The eyewitnesses, who testified for the State, were acquainted with both the victim and the defendant.

We do not think that the closing remarks of the prosecutor suggested that the State's witnesses feared retaliation by the defendant but, rather, were addressed

to the general reluctance of the witnesses to cooperate with the police and the resultant difficulty of the police in getting information from them. When the prosecutor suggested that the defendant had intended to capitalize upon the silence of persons who fear encounters with the police and who fear "becoming involved," the trial court sustained the objection by the defense and instructed the Jury to disregard the remark. For these reasons we perceive no improper prejudice to the defendant as a result of the prosecutor's remarks.

In the third issue raised, the defendant contends due process required instruction to the jury that the State bears the burden of negating the "imperfect" defense elements of voluntary manslaughter. It is well established that if an accused wishes a particular instruction to be given on a certain point, it is his duty to prepare and submit such an instruction to the court (*People v. Smith* (1978), 71 Ill. 2d 95, 374 N.E.2d 472) and that failure to tender such an instruction will result in a waiver of the right to raise the issue on appeal (*People v. Huckstead* (1982), 91 Ill. 2d 536, 440 N.E.2d 1248). In the instant case the defendant concedes that he did not proffer any such instruction but argues that plain error occurred as a result of the failure to instruct the jury concerning the State's burden of negating each element of voluntary manslaughter. We reject this contention on the basis of the holding in *People v. McGee* (1982), 110 Ill. App. 3d 766, 443 N.E.2d 1057. As in the instant case, the court in *McGee* instructed the jury concerning murder and voluntary manslaughter. The court did not include, in the issues instruction on murder, the requirement that the State

prove the absence of sudden and intense passion resulting from serious provocation by the victim. The court in *McGee* noted the holding in *People v. March* (1981), 95 Ill. App. 3d 46, 419 N.E.2d 1212, that the trial court is not required to instruct the jury that the State must negate the elements of voluntary manslaughter beyond a reasonable doubt before a jury can convict a defendant of murder and went on to reach the result reached in *People v. Perez* (1981), 100 Ill. App. 3d 901, 427 N.E.2d 229, which held that where the jury rejected a voluntary manslaughter charge, an omission in the murder instruction did not give rise to plain error. We so hold here.

With respect to the fourth and final issue defendant raises for review, the trial court stated at the sentencing hearing as follows concerning factors in mitigation and aggravation:

> "THE COURT: The Court pursuant to Illinois Revised Statutes, Chapter 38, Section 1005-4-1 has considered the fact that the defendant was found guilty of the charge of murder by a jury, has considered the presentence investigation report, has considered the factors brought to the attention of the Court in aggravation and mitigation, has heard statements relative to sentencing, has afforded the defendant an opportunity to make a statement in his own behalf.
>
> Based upon the Court's independent assessment and in accordance with Illinois Revised Statutes, Chapter 38, Section 1005-4-1, the Court finds the following factors in aggravation:
>
> That in committing the act the defendant inflicted serious bodily injury to another resulting in death; that the defendant has a history of

> prior criminal activity [including a felony conviction for theft and a felony conviction for the distribution of heroin]; and that a sentence is necessary to deter others from committing the same crime.
>
> The Court finds no factors in mitigation.
>
> After an independent consideration of all factors, including but not limited to the foregoing factors in aggravation and mitigation, the defendant is hereby sentenced as follows:
>
> The defendant is remanded to the custody of the Department of Corrections for a term of forty years. Judgment is entered on the verdict and sentence."

At the sentencing hearing the State in its statement to the court cited the defendant's prior criminal activity and asked that the defendant be sentenced "to forty years in the Department of Corrections. I believe that the act was a cold-blooded, premeditated murder. It involved the use of a weapon, a shotgun, and an unprovoked attack upon the victim where he virtually gets his face shot away."

In his brief the defendant maintains that, inasmuch as serious bodily harm that results in the death of the victim is inherent in the offense of murder, the court improperly considered this factor in aggravation. The defendant contends further that "this factor was one of the primary aggravating factors which resulted in Mr. Rose having received the maximum forty year term of imprisonment" and asks that the sentence be vacated and the cause remanded for a new sentencing hearing.

Reliance on an improper factor in aggravation does not always necessitate remandment for resentencing. (*People v. Bourke* (1983), 96 Ill. 2d 327, 449 N.E.2d 1338.)

Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for sentencing; however, where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required. (*Bourke.*) Whether a trial court may properly consider the infliction of serious bodily injury resulting in death as a factor in aggravation in imposing sentence for murder we need not consider here. In view of the trial court's express statement in the record before us that it had considered "all factors," including factors additional to those in aggravation and mitigation, and in view of the nature of the attack upon the victim as well as the 38-year-old defendant's prior felony convictions, the trial court does not appear to have weighed the factor of the infliction of serious bodily injury so heavily that it led to the imposition of a greater sentence. The imposition of sentence is a matter of judicial discretion and, in the absence of an abuse of that discretion, will not be set aside on review. (*People v. Cox* (1980), 82 Ill. 2d 268, 412 N.E.2d 541.) In determining sentence the court may consider the nature and circumstances of the offense as well as the character of the defendant. (*People v. Middleswart* (1984), 124 Ill. App. 3d 35, 463 N.E.2d 1050.) Bearing these principles in mind with regard to the facts of the instant case, we cannot say that the sentence imposed constituted an abuse of Judicial discretion.

AFFIRMED.

WELCH and HARRISON, JJ., concur.

APPENDIX D

NO.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent, vs. JAMES ROSE, JR., Defendant-Petitioner.	Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-84-0078. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 83-CF-242. Honorable Patrick J. Fleming, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

DANIEL D. YUHAS
Deputy Defender
Office of the State Appellate Defender
Fourth Judicial District
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

JOHN J. HANLON
Assistant Defender

COUNSEL FOR DEFENDANT-PETITIONER

ORAL ARGUMENT REQUESTED

NO.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent, vs. JAMES ROSE, JR., Defendant-Petitioner.	Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-84-0078. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 83-CF-242. Honorable Patrick J. Fleming, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF ILLINOIS:

May It Please The Court:

I.

PRAYER FOR LEAVE TO APPEAL

Now comes petitioner, James Rose, Jr., and petitions for leave to appeal the decision of the Illinois Appellate Court, Fifth Judicial District, wherein that Court, in affirming the defendant's conviction and sentence, held that the jury in a murder case need not be instructed that

the State bears the burden of negating the "imperfect" defense elements of voluntary manslaughter.

II.

STATUS OF THE CASE

The Rule 23 Order of the appellate court was filed on July 12, 1985, and is attached as an appendix to this petition. A petition for rehearing was timely filed, and was denied on August 12, 1985.

III.

POINT RELIED UPON FOR GRANTING REVIEW

LEAVE TO APPEAL SHOULD BE GRANTED TO RESOLVE CONFLICTING DECISIONS AMONG THE VARIOUS DISTRICTS OF THE APPELLATE COURT CONCERNING WHETHER THE JURY IN A MURDER CASE SHOULD BE INSTRUCTED THAT THE STATE BEARS THE BURDEN OF NEGATING THE ELEMENTS OF VOLUNTARY MANSLAUGHTER WHEN THOSE ELEMENTS ARE INTRODUCED AS A PARTIAL AFFIRMATIVE DEFENSE TO MURDER, AND BECAUSE THIS COURT HAS EXPRESSLY RECOGNIZED THAT THE EXISTING MURDER INSTRUCTIONS DO NOT ADEQUATELY INFORM THE JURY OF THE DISTINCT AND MUTUALLY EXCLUSIVE MENTAL STATES REQUIRED FOR CONVICTION OF MURDER AND MANSLAUGHTER, AND THUS ARE IN NEED OF AMENDMENT.

IV.

POINT RELIED UPON FOR REVERSAL

THE COURT COMMITTED PLAIN ERROR AND DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE THE JURY, IN CONSIDERING THE CHARGED OFFENSE OF MURDER

AND THE INSTRUCTED UPON OFFENSE OF VOLUNTARY MANSLAUGHTER, WAS NOT INSTRUCTED THAT THE STATE BEARS THE BURDEN OF NEGATING THE PROFFERED ELEMENTS OF VOLUNTARY MANSLAUGHTER.

V.

FACTS RELEVANT TO THE APPEAL

On June 2, 1983, a two-count Indictment was filed in St. Clair County, charging James Rose, Jr., with having committed murder and armed violence on March 16, 1983. (Vol. I, C. 28, 29) At trial, the evidence showed that Thomas Mays (or Maze) had been shot in the face and the hand, and had died soon thereafter. (Vol. II, R. 67; Vol. III, R. 264, 265, 363) Several persons who were in the vicinity of the shooting testified for the prosecution to the effect that Mr. Rose drove up alongside Mr. Mays, who was walking on the side of a road, that a gun barrel was seen protruding from the defendant's car, that shots were heard, and that the defendant's car drove off as Mr. Mays fell into a ditch. (Vol. II, R. 64-67, 106-110, 121-127; Vol. III, R. 230-235)

Two witnesses testified that earlier on the same morning as the shooting, Mr. Mays, who then appeared to be intoxicated, had approached the defendant, scuffled with and struck him, and then had gone into his trailer and fired two shots toward the defendant. (Vol. III, R. 296-302, 312-315) Finally, testimony was heard from the defendant. He testified that he had driven up to Mays so as to reason with him and convince him to leave him alone after their run-in earlier that morning. (Vol. III, R. 358-363) The defendant had a shotgun in his car as a

result of his early-morning dog-training practices. (Vol. III, R. 355-357) According to the defendant, Mays pulled a pistol out of his pocket, and the defendant reacted by shooting it out of his hand in self-defense. (Vol. III, R. 362, 367) The second shot went off accidentally as Mr. Rose attempted to speed away from Mays. (Vol. III, R. 364-366) Mr. Rose did not intend to fire the second shot. (Vol. III, R. 364)

No gun was found on or near the victim's body. (Vol. III, R. 275) However, several persons were seen to approach and/or touch the body. (Vol. II, R. 67, 128)

As a result of all of this evidence, the jury was instructed as to the affirmative defense of self-defense. The jury also received instructions as to the two "imperfect" defenses that would allow the jury to find the defendant guilty of voluntary manslaughter only, those being first, the unreasonable belief that the use of force was necessary, and second, heat of passion as a result of provocation. (Vol. III, R. 419-423) The murder issues instructions made reference to the State's burden of disproving self-defense, but did not inform the jury that the State bore the burden of disproving the mitigating elements of voluntary manslaughter. (Vol. III, R. 420)

The jury found Mr. Rose guilty of murder, and not guilty of voluntary manslaughter. He received a forty year term of incarceration.

In a Rule 23 Order, the Fifth District Appellate Court held that "the trial court is not required to instruct the jury that the State must negate the elements of voluntary manslaughter beyond a reasonable doubt before a jury can convict a defendant of murder. . . . " (Slip Opinion at

p. 10) As authority for this holding, the court cited *People v. McGee*, 110 Ill.App.3d 766, 443 N.E.2d 1057, (2d Dist. 1982), and *People v. March*, 95 Ill.App.3d 46, 419 N.E.2d 1212 (4th Dist. 1981). The court's decision did not address the fact that the *March* decision was overruled, in the Fourth District, prior to the instant decision, by the decision of *People v. Bolden*, 132 Ill.App.3d 1047, 477 N.E.2d 1380, 1387 (4th Dist. 1985). The *McGee* decision itself relied upon *March* for its holding.

VI.

POINT RELIED UPON FOR GRANTING REVIEW

LEAVE TO APPEAL SHOULD BE GRANTED TO RESOLVE CONFLICTING DECISIONS AMONG THE VARIOUS DISTRICTS OF THE APPELLATE COURT CONCERNING WHETHER THE JURY IN A MURDER CASE SHOULD BE INSTRUCTED THAT THE STATE BEARS THE BURDEN OF NEGATING THE ELEMENTS OF VOLUNTARY MANSLAUGHTER WHEN THOSE ELEMENTS ARE INTRODUCED AS A PARTIAL AFFIRMATIVE DEFENSE TO MURDER, AND BECAUSE THIS COURT HAS EXPRESSLY RECOGNIZED THAT THE EXISTING MURDER INSTRUCTIONS DO NOT ADEQUATELY INFORM THE JURY OF THE DISTINCT AND MUTUALLY EXCLUSIVE MENTAL STATES REQUIRED FOR CONVICTION OF MURDER AND MANSLAUGHTER, AND THUS ARE IN NEED OF AMENDMENT.

There are two primary and two subsidiary reasons why leave to appeal should be granted in this case. First, the Fifth District Appellate Court's holding in the instant case that "the trial court is not required to instruct the jury that the State must negate the elements of voluntary manslaughter . . . before a jury can convict a defendant of murder . . . " is in direct conflict with the Fourth District's

stance on that same question. In *People v. Bolden*, 132 Ill.App.3d 1047, 477 N.E.2d 1380 (4th Dist. 1985), the court held that when the defendant introduces some evidence of intense passion, or of "unreasonable belief" that the force used was necessary, the two forms of voluntary manslaughter, that such be treated as a partial affirmative defense, and that the State therefore has the burden to negate the mitigating elements of voluntary manslaughter. Accordingly, the existing jury instructions on the subject are "not adequate", and should be corrected to reflect this burden. In other words, the *Bolden* opinion adopts the position taken by appellant in the case at bar. Specifically, the *Bolden* court stated that:

> . . . The matter is best disposed of as a partial affirmative defense. Self-defense is a complete affirmative defense under the code; either intense-passion or unreasonable-belief voluntary manslaughter should be treated as a partial affirmative defense. . . . We suggest that the existing jury instructions are not adequate . . .
>
> *Bolden*, 477 N.E.2d at 1387.

Leave to appeal should be granted so as to resolve the obvious conflict between the position taken by this court and that taken by the *Bolden* court. The *Bolden* decision also conflicts with the Second District Court's position on this issue. *See People v. McGee*, 110 Ill.App.3d 766, 443 N.E.2d 1057 (2d Dist. 1982).

The second primary reason that leave to appeal should be granted is that this court has expressly recognized that the pattern murder instructions fail to adequately "apprise the jury of the distinct and mutually exclusive mental states necessary to support findings of

guilty for the offenses of murder, voluntary manslaughter and involuntary manslaughter. . . . It follows that amendment of the pattern-instruction is needed." *People v. Hoffer*, 106 Ill.2d 186, 478 N.E.2d 335 (1985). This court stated as such in the context of determining that verdicts of guilty of both murder and manslaughter are legally inconsistent, and are occurring too often in Illinois. Requiring the jury to be specifically instructed that the State bears the burden of negating a defendant's partial affirmative defense is clearly consistent with this court's declaration in *Hoffer*. Such a requirement would help eliminate the possibility that inconsistent verdicts will be returned, and is a logical extension of the rule requiring the jury to be instructed that the State bears the burden of negating the defendant's proffered affirmative defense. *See, e.g., People v. Berry*, 99 Ill.2d 499, 460 N.E.2d 742 (1984).

Leave to appeal should be granted also because the court in the instant case, in holding as they did, relied largely upon *People v. March*, 95 Ill.App.3d 46, 419 N.E.2d 1212 (4th Dist. 1981), even though that case was expressly overruled by the *Bolden* decision, which was decided prior to the instant case. Leave to appeal should be granted so as to correct this glaring error.

Finally, leave to appeal should be granted because this issue is the subject of much litigation and much scholarly discussion. *See, e.g., People v. Debra Bolden*, (No. 62127, Petition for Leave to Appeal pending); *People v. David Taylor*, (No. 61911, Petition for Leave to Appeal pending); O'Neill, *Murder Least Foul: A Proposal to Abolish Voluntary Manslaughter in Illinois*, 72 Ill. B.J. 306 (1984); O'Neill, *With Malice Toward None: A Solution to an Illinois*

Homicide Quandary, 32 DePaul L.Rev. 107 (1983); Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 Chi.-Kent L.Rev. 23 (1982).

VII.

POINT RELIED UPON FOR REVERSAL

THE COURT COMMITTED PLAIN ERROR AND DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE THE JURY, IN CONSIDERING THE CHARGED OFFENSE OF MURDER AND THE INSTRUCTED UPON OFFENSE OF VOLUNTARY MANSLAUGHTER, WAS NOT INSTRUCTED THAT THE STATE BEARS THE BURDEN OF NEGATING THE PROFFERED ELEMENTS OF VOLUNTARY MANSLAUGHTER.

The shooting in the instant case took place only after the eventual deceased, Thomas Mays, had, earlier on the day of his death, fought with the defendant, struck him with a stick, and fired two shots at him. Furthermore, according to the defendant, Mays flashed a gun at him when the defendant drove up alongside Mays as he walked alongside a road.

Because of this evidence, the jury was instructed as to self-defense, and as to the two "imperfect" defenses that would allow the jury to convict Mr. Rose of voluntary manslaughter only: first, heat of passion as a result of provocation, and, second, the unreasonable belief that the use of force was necessary. The murder instructions included reference to the requirement that the State was required to prove the absence of self-defense justification. (Vol. III, R. 664, 665, 677, 678) However, the murder instructions made no reference to the State's burden of

disproving the "imperfect" defense elements and evidence. Such an omission constituted plain error, and warrants a new trial for Mr. Rose.

The jury in this case, and virtually all murder cases, is instructed that in order for the State to prove murder, that it must have shown that three elements were satisfied beyond a reasonable doubt. First, the jury must find that the State must prove that the defendant committed an act which resulted in the death of the victim. Second, this act must have been committed with the intent or knowledge state of mind. Third, the State must prove that the defendant did not act in self-defense, or with any other justification, when such evidence is rendered by the defendant. Appellant's claim is that murder issues instructions, in all cases where voluntary manslaughter is instructed upon, must also have a fourth paragraph, one which informs the jury that the State must prove that the defendant was not acting in the heat of passion, or under the unreasonable belief that the force used was necessary. *See*, I.P.I.-Crim.1st (1968).

Under Illinois law, it is without question that in any case, such as murder, when the defendant puts on evidence of an affirmative defense, such as, for example, self defense, the State bears the burden of proving beyond a reasonable doubt the absence of that defense or justification. Ill.Rev.Stat., 1983, Ch. 38, §3-2(b); *People v. Williams*, 57 Ill.2d 239, 311 N.E.2d 681, *cert. denied*, 19 U.S. 1026 (1974). Quite naturally follows the requirement that in a murder case where self-defense or any affirmative defense is placed into issue, the murder instructions must include reference to the State's burden of disproving the justification defense, I.P.I. Crim.2d, §7.02 (see Committee

note) and 27.01; *People v. Berry*, 99 Ill.2d 499, 460 N.E.2d 742 (1984). The rationale of this rule seems to be that the jury should deliberate as to the question of guilt with the affirmative defense contemporaneously in mind so that the defense evidence receives full and proper consideration.

As stated above, the language that appellant insists was improperly omitted from the murder instructions was reference to the State's burden of disproving the elements of both of the voluntary manslaughter theories. Such should be the practice because voluntary manslaughter is, in essence, very often a quasi defense to a charge of murder, a matter that may in fact be the defendant's only real hope for avoiding a murder conviction. Indeed, it must be recognized that as a practical matter, voluntary manslaughter exists in two extremely different contexts. First, voluntary manslaughter exists as an offense that is charged and sought to be proven by the prosecution. In such cases, the prosecution seeks to prove, as one of the elements of the case, that the defendant acted in the heat of passion, or under the unreasonable belief that force was necessary. Second, and undoubtedly more often, voluntary manslaughter is the verdict that is desired by the defendant who has little hope of making out a defense of self-defense. In such situations, it is the defendant who puts on evidence of heat of passion or unreasonable belief, who requests that the voluntary manslaughter instructions be given to the jury, who may request a voluntary manslaughter verdict as an alternative to murder, and who may argue on appeal that the evidence justified only a voluntary manslaughter conviction. The prosecutor in this context asks

for a murder conviction, presents evidence to rebut the voluntary manslaughter elements, and fights against the voluntary manslaughter instruction.

Under this latter situation, as occurred in the instant case, it is impractical to ignore the fact that voluntary manslaughter is a quasi defense to murder; therefore, a murder instruction should include reference to the State's burden of disproving heat of passion of unreasonable belief, since, as discussed in detail above, Illinois law requires a murder instruction to include reference to the State's burden of disproving all defenses that have been raised by the evidence.

Precisely this posture has been taken by the Fourth District Appellate Court. In *People v. Bolden*, 132 Ill.App.3d 1047, 477 N.E.2d 1380 (4th Dist. 1985), the court held that when the defendant introduces some evidence of intense passion, or of "unreasonable belief" that the force used was necessary, the two forms of voluntary manslaughter, that such must be treated as a partial affirmative defense, and that the State therefore has the burden to negate the mitigating elements of voluntary manslaughter. Accordingly, the existing jury instructions on the subject are "not adequate", and should be corrected to reflect this burden. In other words, the *Bolden* opinion adopts the position taken by appellant in the case at bar. Specifically, the *Bolden* court stated that:

> . . . The matter is best disposed of an a partial affirmative defense. Self-defense is a complete affirmative defense under the code; either intense-passion or unreasonable-belief voluntary manslaughter should be treated as a partial affirmative defense. . . . We suggest that the existing jury instruction are not adequate . . .

> *Bolden*, 477 N.E.2d at 1387; *see also Commonwealth v. Stokes*, 374 N.E.2d 87 (Mass. 1978); W. *LaFave and A. Scott*, Crim.L. §68 at 538, 539 (1972).

Further authority for this proposition is gained from a recent law review article which gives extensive and outstanding analysis of this problem. In James B. Haddad's "Allocution of Burdens in Murder – Voluntary Manslaughter Cases; an Affirmative Defense Approach", 59 Chicago Kent Law Review 23 (1983), the author, a member of Illinois Pattern Jury Instructions (Criminal) committee since 1974, states the general proposition that:

> Illinois decisions are confused and inconsistent in the treatment of burdens in murder and voluntary manslaughter cases. This confusion creates significant practical problems, particularly in jury trials where both forms of verdict are submitted. The best solution would be a legislative enactment which treats voluntary manslaughter as an affirmative defense while still allowing the prosecution the option of charging voluntary manslaughter as a separate crime. If the legislature does not act, the drafters of the Illinois Pattern Jury Instructions and the judiciary can and should adopt the affirmative approach.

Haddad, 59 Chicago Kent Law Review at 61, 62.

Specifically, Haddad recommends that murder issues and definitional instructions include reference to the State's burden of disproving the elements of voluntary manslaughter, since voluntary manslaughter is, in practical effect, and should therefore be treated as, a partial affirmative defense.

The inclusion in a murder instruction of reference to this burden is vital to a proper deliberation of murder and voluntary manslaughter charges for at least three reasons. First, as things currently stand, when the jury deliberates as to the murder charge, there is absolutely no reason for them to ever consider whether or not the voluntary manslaughter elements, *i.e.* the mitigating factors that distinguish voluntary manslaughter from murder, were proven. In other words, when the jury considers the murder charge, it considers only three questions: whether or not the defendant committed an act which caused the death of the victim, whether or not the defendant intended to kill or knew that his act would kill, and whether or not the act was "justified", *i.e.* in self-defense. Clearly, then, the jury does not weigh the elements of voluntary manslaughter when considering a murder charge. Furthermore, once the jury has returned a guilty verdict on murder, the most serious charge, there is no reason for it to bother to go on to fully and properly consider voluntary manslaughter. As stated by Haddad:

> By defining murder without any reference to passion – provocation or imperfect justification, the legislature has seemingly made the presence or absence of such mitigating circumstances irrelevant to a charge of murder.
>
> Haddad, 59 Chicago Kent Law Review at 44.

A second reason that murder instructions should include reference to the State's burden of disproving the voluntary manslaughter mitigating elements is so that the burden of proof as to those elements is clear to the jury. As stated by Haddad:

> *Mullaney v. Wilbur*, and *Patterson v. New York* suggest two possible allocations; either the prosecution must prove the absence of mitigating circumstances to obtain a murder conviction, or the defense must establish the presence of such circumstances, in order to reduce murder to manslaughter. Illinois has chosen a peculiar third alternative; the prosecution must prove the presence of mitigating circumstances to obtain a manslaughter determination, but it may obtain a murder verdict regardless of who proves what about the presence of absence of mitigating circumstances.
>
> Haddad, 59 Chicago Kent Law Review at 32.

In other words, it can only be confusing to the jury to hear the defense present evidence of mitigation which is then rebutted by the prosecution, but then receive instructions that it is the prosecution that must prove, in order to gain a verdict of guilty of voluntary manslaughter, the *presence* of those mitigating circumstances. Indeed, under the instructions given, the defendant effectively is required to shoulder the burden of proving the elements of voluntary manslaughter, a certain violation of due process.

Finally, the insisted upon instruction would eliminate the possibility of inconsistent verdicts, which result when a jury finds the defendant guilty of both murder and voluntary manslaughter. *People v. Hoffer*, 106 Ill.2d 186, 478 N.E.2d 335 (1985); *People v. Stuller*, 71 Ill.App.3d 118, 389 N.E.2d 593 (5th Dist. 1979). Both of these cases held that such verdicts are legally inconsistent and thus improper. Clearly, the holdings in *Stuller* and *Hoffer* came about due to the finding of each court that the trial court had failed to properly instruct the jury that the State must

disprove the voluntary manslaughter mitigating elements.

Even though no objection to the incomplete murder instruction was made on these grounds, the failure to so instruct should be considered plain error. Ill.Rev.Stat., 1983, Ch. 110A, §615(a) (Supreme Court Rule 615(a)). This court has stated that "substantial defects in jury instructions in criminal cases may be noticed despite failure to make a timely objection thereto if the interest of justice require." *People v. Thurman*, 104 Ill.2d 326, 472 N.E.2d 414 (1984), citing, *People v. Huckstead*, 91 Ill.2d 536, 440 N.E.2d 1248 (1982), and Ill.Rev.Stat., 1983, Ch. 110A, §451(c). Specifically, the exception should be invoked to correct "grave errors", or in cases that are "so close factually that fundamental fairness requires that the jury be properly instructed." *Thurman*, 472 N.E.2d at 416.

Here, it should be found that the failure to instruct the jury as to the State's burden of disproving the elements of voluntary manslaughter constitutes "grave error." As discussed in detail above, and as suggested most recently by this Court's *Hoffer* opinion, there is a serious problem in Illinois in determining how to instruct the jury in a murder/manslaughter situation, since the pattern instructions confuse the jury, and invite it to deliberate the murder question without consideration of the imperfect defense elements, and to reach inconsistent findings. Moreover, as between murder and voluntary manslaughter, an extremely close factual question existed. Indeed, because the evidence suggests that the victim had scuffled with Mr. Rose, had then gone into his trailer and fired a shot at or near Mr. Rose, and then had pulled a handgun out during his later encounter with Mr. Rose,

the evidence was sufficiently close to require that the jury be properly instructed as to the State's burden of disproving both self-defense and the "imperfect" defense elements of voluntary manslaughter.

The improper instructions denied the defendant a fair trial.

VIII.

CONCLUSION

WHEREFORE, James Rose, Jr. respectfully requests that this Honorable Court grant leave to appeal and reverse the decision of the appellate court.

Respectfully submitted,

DANIEL D. YUHAS
Deputy Defender
Office of the State Appellate Defender
Fourth Judicial District
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

JOHN J. HANLON
Assistant Defender

COUNSEL FOR DEFENDANT-PETITIONER

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

JAMES ROSE, JR., Petitioner,	)	
vs.	)	
MICHAEL P. LANE, Director, Illinois Department of Corrections,	)	NO. 86-3088
Respondent.	)	

MEMORANDUM IN SUPPORT OF HABEAS PETITION

Petitioner submits this memorandum in support of his habeas petition.

I.

It was not proved beyond a reasonable doubt that Mr. Rose did not possess the belief, albeit unreasonable, that circumstances existed which justified the killing, where during an earlier scuffle between the defendant and the deceased, the latter was intoxicated, hit and cursed at the defendant, and then fired two shots at the defendant, and where during their later meeting the victim was again intoxicated and made threatening gestures toward the defendant.

The Illinois Appellate Court plainly erred when it failed to reduce defendant's conviction from murder to voluntary manslaughter. At trial, the State wholly failed in its burden to prove that defendant did not possess the

requisite belief, although unreasonable, that circumstances justified his killing the victim, Tommy Mays.

Evidence produced at trial clearly indicated that the that the victim, for whatever reason, was actively hostile to the defendant earlier in the day of the shooting. That morning defendant was visiting with L.G. Calamese and Isaac Holmes in Calamese's yard which abuts the property upon which Mays' trailer was located. All agreed that Mays appeared intoxicated when he appeared on his side of a fence separating the properties. (Vol. III. R. 300,314,358) Calamese and Holmes both testified that Mays and the petitioner exchanged words. (Vol II, R. 300,314) According to petitioner's testimony, Mays cursed at him. (Vol. III. R. 358) All three testified that Mays and Rose began "tussling" with each other over the fence, although Calamese and Holmes thought the two were "playing." (R. 300,301,313,359) Rose testified that Mays struck him with a "sunflower stick" and only broke off when Mays "could not get the best of" Rose. (R. 358,359) Although the two other witnesses may have thought Mays and Rose to be "playing", Rose clearly believed that Mays intended to injure him. This was borne out by the fact that Mays, after a further exchange with Rose, returned to his trailer and fired two shots, apparently at Rose. (R. 301,314,358,359) Rose was put in fear for his safety by Mays' hostile conduct. It patently does not matter that the other witnesses may have considered the "tussling" playful because it went to Rose's belief that Mays intended to harm him.

Further corroboration was elicited during the testimony of Leroy Jones, a friend of Mays', who found a rifle on Mays' table along with two spent cartridges in the

trash and a box of bullets. Jones further testified that the rifle and bullets were not there when he had left Mays earlier in the morning, even more evidence that Mays intended to harm Rose. (R. 331,332,334,335,343,344)

Petitioner testified that later in the day he sought out Mays for the purpose of reasoning with him and to end their quarrel. (R. 367) Rose pulled his car up alongside Mays, who was walking along the road. Mays, who all of the State's witnesses agreed was still intoxicated, shook his finger in Rose's face, according to Reginald Coleman. (R. 77,78,86,114,241) All the witnesses agreed that there was an exchange of words or some conversation going on between Mays and Rose. (R. 84,85,108,160,362)

Rose testified that at this point Mays switched the beer bottle he was holding from one hand to another, and pulled out a pistol. (R 362) He further testified that he shot the pistol out of Mays' hand. (R 362) State Witness Kenneth Rattler confirmed that Mays switched hands with the bottle and further admitted that he had told the defense lawyer before trial that Mays appeared to be reaching for something in his jacket. He made a "gesture". (R 124,126) Rattler further testified that Mays had been cursing and abusive immediately before the incident and that others present were trying to calm him down. (R. 114,117) Rattler remembered Mays saying something to the effect: "I can shoot drunk as well as I can sober." (R. 117,118,119) Without question, the facts elicited clearly demonstrate that Rose could form a belief, though unreasonable in the judgment of the jury, that he was justified in killing Mays. The State however, wholly failed

in its burden to negate this by proving beyond a reasonable doubt that under the circumstances Rose could not have formed such an unreasonable belief.

A somewhat similar factual situation was addressed by the First District in *People v. Brown*, Ill. App 3d, 757, 312 N.E.2nd 789 (1st Dist. 1974) Following an argument, defendant's girlfriend announced that she was moving out of the apartment she shared with him. While she left to get some friends to help, defendant went directly to the apartment to prevent her from leaving. He hid in a closet, emerging when the friends entered. Defendant shot the first two immediately and gunned down the third when she entered the room. Defendant was convicted of three counts of murder.

On appeal, the court carefully noted that defendant testified that he had seen the third victim carrying a gun on prior occasions. Although rejecting the argument that defendant acted in self-defense because no gun was found on the victim, the court concluded that the circumstances were such that defendant could have formed an unreasonable belief to justify the killing. The court reduced the conviction to voluntary manslaughter because the defendant knew that the victim had carried a pistol in the past. Here, because of Roses's knowledge of the victim's prior abusive and violent conduct directed toward him, he felt justified, though unreasonably, in killing Mays, and the State wholly failed to negate this.

James Rose's conviction of murder should thus be reduced to voluntary manslaughter pursuant to Ill. Rev. Stat., Ch. 38 § 615(4) (1983).

II

The prosecutor's repeated references to the defendant's allegedly having threatened the witnesses against him with retaliation was both improper and prejudicial, since there was absoluteiy no evidence supporting the remarks, since the court had during trial foreclosed the prosecutor from pursuing this line of questioning, and since the defense had no opportunity to rebut these remarks with evidence or argument of its own.

Comments made by the prosecutor during final argument were so prejudicial and inflammatory as to deny defendant his right to a fair trial. Petitioner must be granted a new trial because of this improper conduct. The appellate court was palpably wrong when it failed to recognize the insidious nature of the comments.

During rebuttal, when the time for reply on his own behalf was no longer available to defendant, the states attorney made the following comments:

> Give me one person that says anything to the police when they come out there. Everyone of them acknowledged that they didn't want to get involved They did not say anything to the police. They did not tell the police one word about it. Not a word.
>
> Can you even imagine? Can you conceive this could happen? And why do you think that could happen? How can it happen that a man, in broad daylight, in front of witnesses, can boldly drive up to a person, and swat him out like a fly?
>
> I will tell you how it happened. It happens when you rule with fear. And these poor police officers beat their brains out trying to get this

story. Yes, they had to work with the story. Sure they had to work to get to the bottom of this thing. And it has been a hard fight every step of the way.

Because shots ring out in Golden Gardens. You hear shots ringing out in Golden Gardens.

is not that uncommon an occurrence to hear shots ringing out in Golden Gardens.

MR. DURSO: Objection, your Honor. There is no testimony to that effect. He is making it sound like a carnival out there.

THE COURT: Closing argument. Overruled.

BY MR. HANKS: And the people that live in Golden Gardens live in fear of things like that.

MR. DURSO: Your Honor, I will object to that.

MR. HANKS: I think I can go to reasonable inferences –

THE COURT: I will sustain that objection.

BY MR. HANKS: They don't tell the police. They didn't cooperate with the police. You put on a badge. You go to the Golden Gardens. You see what cooperation you get.

I will tell you, the police of Centreville did their duty. And I ask you again to consider every witness. They all said no, I didn't talk to the police. I put it off. I held them off. Over and over again. But the police stayed after it and they did their duty.

And some of the people of Golden Gardens finally got up the stuff to do their duty. And the State has done their duty. And I am going to ask you to do yours, because I am going to tell you, this man murdered Thomas Maze (sic) that day. He murdered him in cold blood. And he figured

he could do it because the people were too afraid.

MR. DURSO: Objection, your Honor.

THE COURT: Sustained.

MR. DURSO: And I ask the jury be instructed to disregard that.

THE COURT: The jury will disregard that remark.

MR. HANKS: Thank you.

(Vol. II, R. 414-416)

It is a fact that a prosecutor is free to comment on the character or conduct of the defendant only to the extent that his remarks are supported by evidence in the record and are not calculated to solely arouse the passions or prejudices of the jury. *People vs. Whitlow*, 89 Ill. 2d 322,433 N.E. 2d 629 (1982); *People vs. Smith*, 24 Ill. 2d 198, 181 N.E. 2d 77 (1962). If a prosecutor goes beyond these carefully circumscribed boundaries, his remarks are improper and are particularly harmful when they are made at a time when he has no opportunity to rebut. *People vs. Escobar*, 77 Ill. App. 3d 169, 395 N.E. 2d 1028 (1st Dist. 1979).

A careful reading of the prosecutor's remarks suggests that the true reason for his making them to the jury was to insinuate that Rose himself had intimidated or threatened witnesses into not cooperating with police. Yet there was absolutely no shred of evidence to suggest such conduct on the part of Rose.

The law of Illinois will not tolerate such prosecutorial misconduct, even though the Fifth District clearly ignored the true impact of the comments when it strived to affirm Rose's conviction.

In *People vs. Brown*, supra, at 629, the court stated:

> In the realm of closing arguments, there has developed a growing concern over improper prosecutorial arguments that exceed the boundaries of fairness and impartiality inherent in our system of adversary justice.

The state's attorney in *Brown* made comments about terrorism in a housing project in similar fashion to the prosecutor's remarks about "fear" in Golden Gardens herein. "A defendant, guilty or innocent, is entitled to a fair trial," *People vs. Galloway*, 7 Ill. 2d 527, 131 N.E. 2d 474 (1956). This is a constitutional entitlement. *People vs. Brown, supra, People vs. Savage*, 84 Ill. App. 2d 73.

In *Savage*, the state's attorney argued that potential witnesses had failed to cooperate because they feared the defendants would kill them. In reversing the convictions, the court stated at 80:

> These comments were designed solely to arouse the prejudices of the jury without throwing light upon the question of defendant's guilt and a new trial will be required. [Citations omitted]

Likewise, a new trial is required here. When a prosecutor suggests, without support from the record, that witnesses were afraid because a defendant had threatened or intimidated them, those remarks are "highly prejudicial and inflammatory." *People vs. Ray*, 126 Ill. App. 3d, 656, 467 N.E. 2d 1078 (1st Dist. 1984). In that case, the state's attorney suggested that a witness had moved because of fear of defendant. The court went on to observe at 664:

> The state's interest in a criminal prosecution is not that it must win at all costs, but to assume

> that justice is done, and it is the prosecutor's duty as much as to refrain from improper methods calculated to produce a conviction as it is to employ legitimate techniques to secure a conviction, striking hard blows, but not foul ones.

Petitioner herein calls "foul." In *People vs. Herbert*, 361 Ill. 64, 196 N.E. 2d 821 (1925), a defendant was granted a new trial because the state's key witness testified having had police officer's stationed at her home prior to trial. The Supreme Court, finding the evidence unconnected with the crime, concluded that it had no legitimate place in the case and that it served only to leave the impression that the witness was "in danger of her life or person or being intimidated by threat of violence . . . " because of testifying. (At 823). Such is the case herein. The prosecutor elicited testimony about unrelated gunfire at Golden Gardens and then used them to improperly suggest defendant intimidated and threatened witnesses.

In *People vs. Brown*, supra, it was held that a new trial must be granted when the state improperly suggested without evidence that defendant had threatened witnesses. The court stated at 631:

> In determining whether a prosecutor's closing comments were prejudicial, reference must be made to the content of the language used, its relation to the evidence and the effect of the argument to a fair and impartial trial.

Here, the prosecutor made repeated remarks (R. 102,237) and the court can consider the cumulative impact and not just the remarks in isolation. *People vs.*

Whitlow, 89 Ill. 2d 322, 433 N.E. 2d 628 (1982). Furthermore, the standard is whether the remarks are harmless beyond a reasonable doubt and did not contribute to defendant's conviction. *People vs. Brown, supra.* Finally, the Supreme Court announced early on that if the statements were substantially prejudicial, the effect cannot be cured by the trial court sustaining objections. *People vs. brown, supra,* citing *People vs. Cepek*, 357 Ill. 560, 192 N.E. 573, 578 (1934).

III.

Where the court instructed the jury as to murder, voluntary manslaughter, and self-defense, and where the murder issues instructions included no reference to the state's burden of disproving the elements of voluntary manslaughter, the jury was improperly instructed since they were unable to distinguish the difference between murder and voluntary manslaughter, and since the defense was effectively forced to prove the elements of voluntary manslaughter.

The Appellate Court was clearly wrong when it concluded that the state need not bear the burden of negating the "imperfect" defense elements of voluntary manslaughter. A new trial must be ordered.

The trial court instructed the jury as to the affirmative defense of self-defense. It also instructed the jury as to the two "imperfect" defenses which would have permitted it to find Rose guilty of voluntary manslaughter, i.e. an unreasonable belief that force was necessary and heat of passion as a result of provocation. The court further instructed the jury that the state bore the burden

of proving that Rose did not act in self-defense when he killed Mays. However, the murder instruction was fatally defective because it did not require the state to disprove the "imperfect" defense elements which would have warranted a conviction on manslaughter only. This defect meant that the state was not required to prove all of its case against Rose beyond a reasonable doubt.

The state is required to prove beyond a reasonable doubt the guilt of the defendant as to the issues raised by the assertion of an affirmative defense. Ill. Rev. State., Ch 38, § 3-2(b) (1983) The Illinois Pattern Instructions – Criminal states that if the defendant raises an affirmative defense, the murder issues instruction must clearly indicate that the state must disprove the elements of that defense beyond a reasonable doubt. *People vs. Williams*, 57 Ill. 2d 239, 311 N.E. 2d 681 *cert. denied*, 419 U.S. 1026 (1974); *People vs. Berry* 99 Ill. 2d 499, 460 N.E. 2d 742 (1982)

What must be understood is that the elements of voluntary manslaughter effectively constitutes an affirmative defense to murder and it is not merely a lesser included offense in murder. See *People vs. March*, 95 Ill. App. 2d 46, 419 N.E. 2d 1212 (4th Dist. 1981) (Green, concurring); Haddad, "Allocation of Burdens in Murder-voluntary Manslaughter Cases; An Affirmative Defense Approach," 59 Kent L. Rev. 23, 26-31. Both suggest that voluntary manslaughter is not an included offense in murder. Haddad further suggests that voluntary manslaughter should be treated, at least partially, as an affirmative defense to murder and therefore the instruction is flawed in failing to require the state to assume an existing burden of proof.

What must be considered is that the prosecutor's use the voluntary manslaughter charge in two ways: (1) as an offense by itself; (2) joined with a murder charge as an alternative method of securing a conviction. Obviously, voluntary manslaughter cannot be employed as an affirmative defense when it is the only charge. However, by its very nature, it becomes an affirmative defense to a murder charge in the second scenario.

Petitioner is not arguing a novel approach. In *Mullaney v.Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1974), the Supreme Court said due process requires that the state prove beyond a reasonable doubt the absence of heat of passion when evidence of that was introduced as an affirmative defense. This is unlike *Patterson vs. New York*, 432, U.S. 197, 97 S. Ct. 2319, when the court held it permissible to shift the burden of proof on the issue of "extreme emotional disturbance" when it did not affect the elements of murder and the burden of proof thereon. So it should be here under the rationale of *Mullaney*. The state must shoulder the burden of proving beyond a reasonable doubt that Rose could not have formed an unreasonable belief that his killing of Mays was justified. Otherwise, defendant is being deprived of his due process by being forced to bear the burden of proving his innocence by proving the elements of voluntary manslaughter without the state being required to negate them.

The jury must be able to comprehend the distinction existing between murder and voluntary manslaughter to insure defendant a fair trial. In *Commonwealth vs. Stokes*, 374 N.E. 2d 87 (Mass. 1978) the Massachusetts Supreme Court held that *Mullaney* required that a jury must be

instructed as to the state's burden to prove, beyond a reasonable doubt, the absence of heat of passion or sudden provocation in a murder/manslaughter case:

> [Where] such mitigating circumstances are adequately raised in the evidence, and where both murder and manslaughter are being submitted to the jury as permissible verdicts, the judge must now instruct the jury that they may not return a verdict of guilty of murder unless the Commonwealth proves the absence of the heat of passion or sudden provocation beyond a reasonable doubt.
>
> 374 N.E. 2d, 8) at 94

In *People vs. McGee*, 110 Ill. App 3d 766, 7434 N.E. 2d 1057 (2nd Dis. 1982), the Second District erroneously concluded that a jury need not be instructed that the state bears the burden of negating "imperfect" defenses elements. The court failed to consider the *Mullaney* decisions and further relied upon what was really dicta in a concurring opinion in *March, supra.*

Indeed, the majority opinion refused to consider the issue raised herein, there being other grounds without constitutional implications to reverse the conviction.

Finally, this issue has not been waived, even though no instruction was requested at trial. "[S]ubstantial defects in jury instructions in criminal cases may be noticed despite failure to make a timely objection thereto if the interests of justice require". *People vs. Thurman.*, 104 Ill. 2d 326, 472 N.E. 2d 414 (1984), citing *People vs. Huckstead, 91 Ill. 2d 536, 440* N.E. 2d 1248 (1982) and Ill. Rev. State., Ch. 110A, § 451(c) (1983). In *Thurman*, failure of the

instructions to include "without lawful justification" language in an involuntary manslaughter charge.

The court concluded that it was a "grave error" to so fail and reversed because the court failed to instruct the jury that the state bears the burden of disproving defendant's theory of defense, in that case self-defense.

Because it was plain error to fail to adequately instruct the jury, the conviction should be reversed and the cause remanded for new trial.

IV.

Consideration by the court, in sentencing the defendant to the maximum forty year term for murder, of the fact that the defendant's conduct had caused serious bodily injury resulting in death, was improper since that factor is inherent in all murder cases.

The trial court improperly considered the fact that the defendant's conduct had caused serious bodily harm resulting in death to Tommy Mays when death is inherent in all murder cases. Since that factor was considered, the sentence should be vacated and remanded for a new sentencing hearing.

A trial court, when sentencing a criminal defendant, may take into consideration the nature of the offense and the manner in which it occurred *People vs. Hunter,* 101 Ill. App. 3d 692, 428 N.E. 2d 666 (5th Dist. 1981). Here evidence received in aggravation was terse and vague. The prosecutor began his brief remarks with restating the obvious that the defendant's conduct caused serious bodily injury to another, in fact, caused his death (Vol. I,

137). The court firmly taking the state's attorney's lead, listed as the first factor in aggravation the fact that in committing the act the defendant inflicted serious bodily injury to another resulting in death. (Vol. I, 140) He listed a past criminal record, none involving violence, and deterrence.

In *People vs. Hunter,* 101 Ill. App 3d 692, 428 N.E. 2d 666 (5th Dist. 1981), the reviewing court applauded the trial court for the specificity of his lengthy comments concerning aggravating factors and it affirmed the trial Court's sentencing on those grounds. Here, we do not have any specificity with regard to the trial courts findings of facts in aggravation. There is no analysis.

In *People vs. Conover,* 84 Ill. 2d 400, 419 N.E. 2d 906 (1981), the court held that receipt of proceeds from a theft or burglary is implicit in those offenses and could not be considered as an aggravating factor under Ill. Rev. State. Ch. 38, § 1005-5-3.2 (a) (2) (1983). In language which the Appellate Court failed to heed, the Supreme Court stated at 909:

> Inasmuch as most burglaries and every theft involves proceeds, it is reasonable to conclude that the legislature already considered that factor in establishing the penalties. If the General Assembly had intended that proceeds be utilized again to impose a more severe penalty for those offenses, such intent would be more clearly expressed.

Subsequent appellate court opinions have applied the *Conover* holding. In *People vs. Allen,* 97 Ill. App. 3d 38, 422 N.E. 2d 254 (4th Dist. 1981), the reviewing court found it improper that the trial court considered the threat of

serious harm as an aggravating factor in a burglary conviction. The court reasoned that the threat of serious harm was inherent in the offense itself. In *People vs. Bone*, 103 Ill. App. 2d 1066, 4332 N.E. 2d 329 (3rd Dist. 1982), the court indicated that while the death of the victim could be considered as an aggravating factor in the armed robbery conviction, it could not be so considered in his murder convictions.

Obviously, the death of the victim in a murder case is hardly unique. Rather death is the inherent factor which is required to call a crime a murder. Applying the *Conover* rationale to the case at bar, it is clear that the trial court acted improperly when it considered the victim's death as an aggravating factor justifying the maximum penalty.

A remand for resentencing is not required where the reviewing court finds that the trial judge did not give significant weight to the factor or when it is unable to determine the weight given to the factor. *People vs. Bourke*, 96 Ill. 2d 327, 449 N.E. 1338 (1983). However, it seems clear that the trial court below considered the death of Tommy Mays to be the primary factor in aggravation. This was clearly improper. Furthermore, the other two factors cited in aggravation, prior criminal record and deterrence, can hardly be considered the true basis for the court's imposition of the maximum sentence.

It is apparent that the trial court gave improper consideration to the death of Tommy Mays when it sentenced Petitioner to forty years imprisonment. There were no other factors cited which would have compelled the

imposition of so severe a sentence. Thus, this cause should be remanded for a resentencing hearing.

Respectfully submitted,

CARLSON & ALFELD, P.C.

By /s/ Philip B. Alfeld

Philip B. Alfeld
Attorney at Law
P.O. Box 527
#40 Edwardsville Prof. Park
Edwardsville, IL 62025
(618) 656-0066

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in a sealed envelope addressed to each attorneys at their business address illegible on the 18th day of December, 1986.

/s/ Janice L. Goodwin

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 27, 1989.

AMENDED

By the Court:

JAMES ROSE, JR., Petitioner-Appellant, No. 87-2494 VS. MICHAEL P. LANE, Respondent-Appellee.	Appeal from the United States District Court of the Southern District of Illinois, East St. Louis Division No. 86 C 3088 Hon. Gerald B. Cohn, *Magistrate*

The court on its own motion, DISCHARGES Attorney Robert H. Rice from further responsibility in this appeal, and appoints Mr. Thomas A. Roberts, One First National Plaza, Chicago, Illinois, 60603, as counsel for the petitioner-appellant to review the record and file a new brief. The brief should address any issue which counsel believes should be raised. Counsel should also address whether, and to what extent, *People v. Reddick*, 123 Ill. 2d 184, 526 N.E. 2d 141 (1988), should apply retroactively, and whether the failure to instruct a jury on an element of a crime proscribed by state law constitutes a federal constitutional violation. *See, e.g., Cole v. Young*, 817 F. 2d 412, 416, (7th Cir. 1987).

Briefing shall proceed as follows:

1. Petitioner-Appellant shall file his brief and short appendix on or before January 17, 1990.

2. Respondent-Appellee shall file its brief on or before February 16, 1990.

3. Petitioner-Appellant shall file his reply brief, if any, on or before March 2, 1990.

NOTE: The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.